1229-54

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

NO. [illegible], 141

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

HUGH J. GALLAHER, JOSEPH G. [illegible]
E. LOAKE DOING BUSINESS UNDER THE NAME
OF GALLAHER, LOAKE & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED [illegible], 1894.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 425.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

HUGH L. GALLAHER, JOSEPH G. LOANE, AND HENRY E. LOANE, DOING BUSINESS UNDER THE FIRM NAME OF GALLAHER, LOANE & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed July 17, 1880	1	1
Traverse, filed September 6, 1880	21	16
Plea of set-off, filed April 5, 1882	22	16
Replication, filed May 6, 1882	24	17
Findings of fact and conclusions of law	26	17
Opinion of the court	35	27
Final judgment	40	31
Application of defendant for and allowance of appeal	41	32
Certificate	42	32

1 I.—*Petition.*—*Filed July* 17, 1880.—*A. H.*

In the United States Court of Claims.

HUGH L. GALLAHER, JOSEPH G. LOANE, AND Henry E. Loane, doing business as firm of Gallaher, Loane & Company,
vs.
THE DISTRICT OF COLUMBIA. } No. 21.

To the honorable JUDGES OF SAID COURT:

Your petitioners respectfully represent that on the twenty-second day of December, in the year one thousand eight hundred and seventy-three, a written contract was made by and between Alexander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and your petitioners, Hugh L. Gallaher, of Waynesboro, Augusta County, Virginia, Joseph G. Loane and Henry E. Loane, of the city of Baltimore, in the State of Maryland, of the second part, in words and figures as set forth in Exhibit A, which is a copy of said contract.

That by the terms of said contract (section 13) the Board of Public Works, on behalf of the District of Columbia, expressly agreed to cause to be paid to said parties of the second part, their heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due them according to contract.

That the said Board of Public Works, on behalf of the District of Columbia, did fail and refuse to pay your petitioners as they had expressly agreed, but from time to time issued to your complainants on
2 account of work done certain bonds and certificates of greatly depreciated value.

That by the said contract, the said Board of Public Works, on behalf of the District of Columbia, bound themselves to pay unto your petitioners for building and completing the brick arch upon stone abutments of Tiber Creek sewer, as set out and described in said contract, "one hundred and thirteen dollars per lineal foot," payable in sewerage certificates, as provided by act of legislative assembly of the District of Columbia, approved June 26, 1873.

Your petitioners allege that they fully complied with the terms of said contract; that the work done and accepted under the same amounts to 3,184.4-10 lineal feet, the contract price for which is $359,837.20.

That they have received in all, on account of said work, depreciated bonds and certificates, the par value of which is $324,400.71, and your petitioners now claim on account $35,436.49. (See Exhibit B.)

And your petitioners further state, that by order of its duly authorized agents, they did certain extra work for the District of Columbia, furnishing extra material for the same; an exact account of all of which is fully set out in Exhibit B, Abstracts A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S. And your petitioners not having been paid for said extra work and materials claim $98,130.44, the said extra work and materials having been accepted by the District of Columbia.

And your petitioners further allege that they paid in cash $35 on account for the District of Columbia for auditor's report in the case of the Baltimore and Potomac Railroad vs. Gallaher, Loane & Co., and the Commissioners of the District of Columbia, supreme court of the District of Columbia, equity docket No. 4218, and extra costs in said case, $50.

And your petitioners claim as interest on deferred payments for work done for the District of Columbia $4,807.62, as will more fully appear in Abstract R, annexed hereto.

And your petitioners pray judgment against the District of Columbia for the following sums, claimed as aforesaid:

On account of work done under contract	$35,436 49
Extra work and materials	98,130 44
Court and auditor's fees	85 00
Interest on deferred payments	4,807 62
	$138,459 55

In all amounting to one hundred and thirty-eight thousand four hundred and fifty-nine dollars and fifty-five cents.

GALLAHER, LOANE & COMPANY.

3 CITY OF BALTIMORE,
State of Maryland:

Joseph G. Loane personally appears before me, a notary public, who, being first sworn, deposes and says that he is a member of the firm of Gallaher, Loane & Co., the claimants in this suit; that no assignment or transfer of said claim, or any part thereof or interest therein, has been made, except as stated in petition, and that said claimants are justly entitled to the amount therein claimed, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

JOSEPH G. LOANE,

Witness my hand and seal, in the city and State above written, this 13th day of July, A. D. 1880.

[SEAL.] EDWARD RAINE,
Notary Public.

EXHIBIT A.

[No. 1012. Cancels C. No. 772. See F, No. 1687. Copy.]

This contract, made and concluded this twenty-second day of December, in the year one thousand eight hundred and seventy-three, by and between Alexander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and Hugh L. Gallaher, of Waynesboro, Augusta County, Va., and Joseph G. Loane, and Henry E. Loane, of Baltimore, Maryland, of the second part, witnesseth:

First. That the said parties of the second part have agreed, and by these presents do agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to

furnish at their own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner, to excavate for, build, and complete the continuation or extension of the Tiber Creek sewer (a semi-el'iptical brick arch upon stone abutments), beginning at the present terminus of the said Tiber Creek sewer, at Third street SW. and Maryland avenue, and proceeding thence along a line parallel to the line of the old Washington Canal to its junction with the James Creek Canal, at the south building line of G street south, in the city of Washington, D. C. (as per accompanying plan showing the course of said sewer), the said sewer to be built and completed in accordance with the specifications following, to wit:

4 SPECIFICATIONS.

For the continuation of the Tiber Creek sewer from its presents terminus at Third street west and Maryland avenue, and proceeding along a line parallel to the line of the old Washington Canal to its junction with the James Creek Canal at the south building line of G street south, in the city of Washington, D. C.

The total length of the extension measured on center line of the sewer is about 3,090 lineal feet. Its construction and size is similar to the one running from the north side of Pennsylvania avenue to Third street west, or the beginning of the extension. The foundation which forms at the same time the following flooring of the sewer, consists of heavy planking secured to transverse sleepers. On their floor rests the side walls of masonry three (3) feet high and 5 feet 6 inches thick, supporting an approximate semi-el'iptic arch of thirty (30) feet span and six (6) feet six (6) inches rise. The extrados of this arch up to the level of its crown must be backed with masonry.

The sleepers of the foundation must be 10 x 10 inch white-pine timber thirty-seven feet long, extending from inside of wall to outside of wall and laid at intervals of two (2) feet from center to center; they must be carefully bedded on the soil so as to rest perfectly solid and level, and their interstices must be thoroughly ballasted with broken stone or gravel. Wherever it shall be impracticable or impossible from the nature of the ground to get a perfect bearing for the sleepers; the soil must be removed and replaced by concrete in accordance with the directions of the engineer. On the above named sleepers three (3) inch planking of white pine running longitudinally with the sewer is to be laid and spiked to each sleeper, with two (2) eight (8) inch wrought-iron spikes, the planks to be no less than six (6) or more than ten (10) inches wide; all inequalities, projections, &c., that may occur must be adzed off so as to leave a true bed for the masonry, and a smooth bed for the sewerage; all the above named lumber must be perfectly sound and of the best quality.

The stone masonry must be of Seneca stone or blue rock laid in cement, the inside of sewer face of the walls to be rough dressed and up to the springing of the arch, no stone ought to be less than eight (8) inches in height nor less than five (5) cubic feet, and at least one-quarter ought to be bound stone.

The skew-back course must be the width of the wall, viz, (3–6), three feet six inches, and the blocks must be in length not less than four (4) feet.

The haunch masonry may consist of smaller stones and near the crown of the arch may be replaced by concrete.

The brick arch is to be two bricks or eighteen (18) inches in thickness, laid in the best manner in cement mortar. The bricks to be best hard burnt, of regular shape and size, clean, and wet before used. All arch brickbats and all irregular and uneven bricks to be rejected. The centerings must conform at the northern terminus to the old arch, and the bend of the sewer must be made in accordance with the instructions of the engineer. In no case must the centering be struck before the thorough setting of the mortar. All the connections for lateral sewers must be made where and as directed by the engineer. In filling the ground against the sides of the sewer the filling next to and within ten (10) feet of the walls must be puddled and rammed.

The contractors will be required to procure at their expense all the filling required to close the canal at the sides of the above named sewer for the width of Third street, and from a point of forty (40) feet north of the north part of the sewer to the south end thereof, and to the depth of two (2) feet above the crown of the masonry as shaded in the plan.

The mortar required for the aforesaid work shall be made from fresh hydraulic cement and clear sharp sand in such proportions as the engineer will direct, and must be made in small quantities for immediate use. No mortar after it has set will be worked over and used.

All the expense in pumping and draining or any other loss or damage which may arise from the nature of the work, or be caused by the action of the elements, must be borne by the contractors.

Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person or persons shall have any opportunity and all opportunities and privileges which may be necessary to enable them faithfully make the inspection aforesaid.

Fourth. It is further agreed that the said party of the first part may, on notice to the said parties of the second part, suspend work under this contract; but if not suspended it shall be completed by the first day of Sept., 1874, from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part, and that any subletting or assignment, without such consent, shall work a forfeiture of this contract.

Fifth. It is further agreed that if, at any time, the party of the first part shall be of opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractors are willfully violating any of the conditions or covenants of this contract, or are executing the same in bad faith, all of the work may be discontinued under this contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the said parties of the second part, and the expense so charged shall be deducted and paid by the said party of the first part, out of such moneys as may be then due, or may

at any time thereafter grow due to the said parties of the second part, under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the said parties of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum the amount of such excess shall be paid to the said party of the first part by the said parties of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances or injuries, to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractors; and the said contractors hereby agree, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected, so as to prevent all injuries to persons, travelers, animals, or property; and in event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work, as aforesaid, the said party of the first part shall retain, out of any money or moneys due, or to become due, said contractors, a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law or otherwise.

Seventh. It is further agreed that the said parties of the second part shall punctually pay the workmen who shall be employed by them on work under this contract, in cash current, and not in what is denominated store pay or orders; and that they will from time to time, and as often as may be required by the said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not
6 furnished such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify in writing that the parties of the second part have completely performed this contract on their part, and shall submit, with said certificate, his estimate of the amount due the parties of the second part, then, within thirty (30) days as hereinafter provided, the said parties of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said parties of the second part further agree that they shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the parties of the second part under this con-

tract shall be paid to them, excepting such sum or sums as may be retained under any provision of this contract: Provided, That partial payments may be made, under direction of said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of one (1) year from the completion of the work to be done under this contract, any part or parts thereof shall become defective, from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said parties of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said parties of the second part to do so, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said parties of the second part.

Tenth. It is further agreed that the said parties of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

For building and completing the semi-e'liptical brick arch upon stone abutments of Tiber Creek sewer as aforesaid, per lineal foot, one hundred and thirteen ($113) dollars, payable in sewerage certificates as provided by act of legislative assembly of the District of Columbia approved June 26th, 1873, which said sums or prices the said party of the first part shall pay to the said parties of the second part, as herein provided.

Eleventh. And it is further agreed that should any litigation arise in any way connected with the work embraced as aforesaid, in this contract, from or by reason of any demand or demands, claim or claims, by any person or persons, to use within the said District of Columbia the improvement, or pavement or pavements, contracted for herein to be laid and put down by the said parties of the second part, under or by reason of any patent, or assignment of patent, either in the form of royalty or damages, or in any otherwise, the said parties of the second part will indemnify and save harmless the said party of the first part from all said demand or demands, claim or claims, whether arising out of suits or otherwise; and the
7 said party of the first part may, at its option, retain from the amount or amounts due, or to become due, under this contract to the said parties of the second part, such sum or sums as may be necessary or sufficient to satisfy or liquidate all of said demands or claims, as aforesaid, until they shall be amicably adjusted or finally determined at law.

Twelfth. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants.

Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said parties of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said parties of the second part, or to their heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due them according to the contract.

Fourteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

ALEX. R. SHEPHERD, [L. S.]
H. A. WILLARD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
ADOLF CLUSS, [L. S.]
JNO. B. BLAKE, [L. S.]
Board of Public Works of the District of Columbia.

H. L. GALLAHER, [L. S.]
JOS. G. LOANE, [L. S.]
HENRY E. LOANE, [L. S.]
Contractors.

Signed and sealed in the presence of—
F. H. JOHNSON.
JOHN HURLEY.
WM. E. NOTT.

Know all men by these presents that we, Hugh L. Gallaher, of Waynesboro, Augusta County, Va., Joseph G. Loane and Henry E. Loane, Nicholas Acker and Charles Mades, of the District of Columbia, are held firmly bound unto Alexander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia, in the sum of fifty thousand ($50,000) dollars lawful money of the United States of America to be paid to said Alexander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia, or to the certain attorney, successor, or assigns thereof; for which payment, well and truly made, we and each of us do bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seal. Dated this twenty-second day of December, A. D. one thousand eight hundred and seventy-three.

Whereas the above bounden Hugh L. Gallaher, Joseph G. Loane, and Henry E. Loane, by an instrument in writing under their hands and seals bearing even date with these presents, have contracted with Alex-
8 ander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia, to excavate for, build, and complete the continuation or extension of the Tiber Creek sewer, a semi-el'iptical brick arch upon stone abutments, beginning at the present terminus of the said Tiber Creek sewer at Third street SW., and Maryland avenue, and proceeding thence along a line parallel to the line of the old Washington Canal, to its junction with the James Creek Canal at the south building line of G street south, in the city of Washington, D. C., as fully described in foregoing contract and on the conditions and for the considera-

tions in the aforesaid contract mentioned and contained or referred to therein.

Now, therefore, the condition of the above obligation is such that if the said Hugh L. Gallaher, Joseph G. Loane, and Henry E. Loane, shall well and truly and in a good, sufficient, and workmanlike manner execute the work mentioned in said contract and complete the same in accordance with the stipulations thereof, and in each and every respect fully comply with the provisions and requirements therein contained, then this obligation to be void; otherwise to remain in full force and virtue.

H. L. GALLAHER. [L. S.]
JOS. G. LOANE. [L. S.]
HENRY E. LOANE. [L. S.]
NICHOLAS ACKER. [L. S.]
CHARLES MADES. [L. S.]

Signed and sealed in the presence of—
F. H. JOHNSON.
WM. E. NOTT.

9 EXHIBIT B.

WASHINGTON, D. C., *January* 30, 1876.

The Commissioners of the District of Columbia to Gallaher, Loane & Co. Dr.

For excavating, building, and completing the continuation or extension of the Tiber Creek sewer, as per contract executed the 22d December, 1873, 3,184 1/10 linear feet, at $113 per linear foot $359,837 20

CREDIT.

1873.						
December	31.	By sewer bonds			$6,400 00	
1874.						
August	19.	By 3.65 District of Columbia bonds.....			41,320 15	
October	2.	Do.	do.	do.	do.	75,007 08
October	13.	Do.	do.	do.	do.	22,681 80
November	19.	Do.	do.	do.	do.	63,871 10
1875.						
January	14.	By 3.65 District of Columbia bonds.....			14,3 0 00	
February	9.	Do.	do.	do.	do.	61,794 09
September	22.	Do.	do.	do.	do.	36,426 49
1876.						
January	27.	By 3.65 District of Columbia bonds.....			2,600 00	
						324,400 71
Debtor						$35,436 49

For building Delaware-avenue sewer	Abstract A' ..	$495 32	
Do.	C-street sewer	do. B' ..	1,569 25
Do.	E street sewer	do. C' ..	3,404 12
Do.	apron wall, Tiber Creek sewer	do. D' ..	639 50
Do.	extra foundation, G street, Tiber Creek sewer, Abstract E'		530 72
Do.	brick bottom at outlet Tiber Creek sewer, Abstract F'		3,343 72
Do.	dam at Virginia avenue, Tiber Creek sewer, Abstract G'		937 53
Do.	granite face at outlet Ti er Creek sewer, Abstract H'		1,852 69
For tearing down and rebuilding abutments Tiber Creek sewer, Abstract I'			935 87
For extra work at G street, Tiber Creek sewer, Abstract J ...			57 50
For changing sewer connections, Tiber Creek sewer, Abstract K			40 25
For cleaning old Tiber sewer at Maryland avenue, Abstract L			45 87

For laying sewer pipe at Maryland avenue, Abstract M		$56 50	
For getting stone out of old canal, Abstract N		25 00	
For iron manholes at Maryland avenue and E street, Tiber Creek sewer, Abstract O		61 75	
For extra timber used at Maryland avenue, Tiber Creek sewer, Abstract P		18 00	
For increased size of arch, Tiber Creek sewer, Abstract Q		56,712 59	
Actual cost		$70,756 18	
Add 30 per cent. for profit		21,226 85	
			$91,983 03
For interest on deferred payments, Abstract R			4,807 62
For additional strengthening of arch, &c., at the crossing of the Baltimore and Potomac Railroad at Virginia avenue, as per audited account of the supreme court of the District of Columbia, Abstract S			6,197 41
			$138,424 55

ABSTRACT A.—*Building Delaware avenue sewer.*

Excavation:			
Foreman, 8¼ days, at $3		$26 25	
Carpenter, 4 " at $3		12 00	
Laborers, 86½ " at $1.25		108 12	
			$146 37
Masonry:			
Masons, 7½ days, at $4		$29 00	
Laborers, 11½ days, at $1.50		16 87	
Horses and carts, 10 days, at $2.25		22 50	
			68 37
Filling over with earth:			
Foreman, 4 days, at $3 00		$12 00	
Laborers, 51½ days, at $1.25		64 37	
Horses and carts, 19½ days, at $2.25		43 87	
			120 94
John W. Loane's bill:			
Bricklaying			9 06
5 barrels cement for bricklayers, at $1.50			7 50
37⅛ perches stone for bed and sides, at $2.50			92 92
Cement for stonework, at $1 per perch			37 15
Sand for stone work, at 10 cents per perch			3 71
500 feet lumber for piling, at $20			10 00
			$495 32

2-foot 24-inch sewer pipe, 80 feet long.

ABSTRACT B.—*Building C street sewer.*

Excavation:			
Foreman, 23¾ days, at $3		$71 25	
Laborers, 104¾ days, at $1.25		130 93	
Carpenters, 6 days, at $3		18 00	
			220 18
Masonry:			
Masons, 17¾ days, at $4		$71 00	
Laborers, 27¾ days, at $1.50		41 62	
Horses and carts, 12 days, at $2.50		30 00	
			142 62
Filling over with earth:			
Foreman, 2 days, at $3		$6 00	
Laborers, 27¼ days, at $1.25		34 06	
Horses and carts, 9 days, at $2.50		22 50	
			62 56
John W. Loane's bill:			
Bricklaying			128 55
112½⅓ perches stone for bed, &c., at $2.50			281 20
Cement for same, at $1 per perch			112 50
Sand for same, at 10 cents per perch			11 25
1,500 feet lumber for centers and piling, at $20			30 00
Spikes and nails			5 00
15,367 bricks, at $10			153 67
Cement for bricks, 39 barrels, at $1.50			58 50
Sand, 16 loads, at 75 cents			12 00

Rebuilt 23 feet, destroyed by freshet:		
35½ perches stone, at $2.50		$88 75
Cement for same, at $1 per perch		35 50
Sand for same, at 10 cents per perch		3 55
4,842 bricks, at $10		48 42
Cement for brick work, 12 barrels, at $1.50		18 00
Sand, 5 loads, at 75 cents		3 75
Masonry, 35½ perches stone, at $1.50		53 25
Foreman of works, 25 days at $4		100 00
		$1,569 25

4-foot brick sewer, 73 feet long.

ABSTRACT C.—*Building E street sewer.*

Excavation:		
Carpenters, 5 days, at $3	$15 00	
Foreman, 32½ days, at $3	96 75	
Laborers, 188½ days, at $1.25	235 31	
Horses and carts, 13½ days, at $2.50	33 75	
		$380 81
Masonry:		
Masons, 31½ days, at $4	$127 00	
Laborers, 50½ days, at $1.50	75 38	
Horses and carts, 8 days, at $2.50	20 00	
		222 38
12 Filling over with earth:		
Foreman, 9 days, at $3	$27 00	
Laborers, 136 days, at $1.25	170 00	
Horses and carts, 53½ days, at $2.50	133 13	
		330 13
John W. Loane's bill:		
Bricklaying		356 00
38,420 bricks, at $10		384 20
274 perches stone, at $2.50		685 00
Cement for stone, $1 per perch		274 00
Sand for stone, at 10 cents per perch		27 40
500 feet of lumber for centers, at $20		10 00
2,000 feet of lumber for piling, at $20		40 00
96 barrels cement for brick work, at $1.50		144 00
38½ loads sand for brick work, at $0.75		28 88
40 feet rebuilt, destroyed by freshet:		
80½ perch stone, at $2.50		201 25
Cement, $1 per perch		80 50
Sand, 10 cents per perch		8 05
Laying masonry, at $1.25 per perch		100 62
9,040 bricks, at $10		90 40
22½ barrels cement for brick work, at $1.50		33 75
9 loads sand for brick work, at $0.75		6 75
		$3,404 12

4½-foot brick sewer, 170 feet long.

ABSTRACT D.—*Building apron wall, Tiber Creek sewer.*

Excavating, masonry, &c.:	
Carpenters, 25 days, at $3	$75 00
Laborers, 203 days, at $1.25	253 75
Masons, 14½ days, at $4	57 00
Laborers, 5½ days, at $1.75	9 19
Laborers, 12½ days, at $1.50	18 00
Laborers, 33½ days, at $1.25	41 56
Horses and carts, 3½ days, at $2.50	7 00
42½ perches stone, at $2.50	106 25
Cement, $1 per perch	42 50
Sand, 10 cents per perch	4 25
Lumber for piling, &c., 2,500 feet, at $20	50 00
Nails and spikes	5 00
	$669 50

13 ABSTRACT E.—*Extra foundations for abutment walls at G street, Tiber Creek sewer.*

Masons, 15½ days, at $4	$62 00	
Laborers, 42½ days, at $1.50	63 37	
Horses and carts, 2 days, at $2.25	4 50	
		$129 87
Excavating, &c.:		
Carpenters, 8 days, at $3	$24 00	
Laborers, 77 days, at $1.25	96 25	
		120 25
52½ perches stone, at $2.50		131 25
Cement, at $1 per perch		52 50
Sand, at 10 cents per perch		5 25
Lumber, for piling, 3,700 feet, at $20		75 60
4 pieces heavy timber, laid lengthwise, two on each side, at $4		16 00
		$530 72

ABSTRACT F.—*Building brick invert near outlet Tiber Creek sewer.*

Bricklayers, 68 days, at $4	$272 00
Laborers for same, 60½ days, at $1.50	90 75
Gang foreman, 39½ days, at $2	79 50
Laborers, 424½ days, at $1.25	530 93
Carpenters, 76 days, at $3	228 00
Superintendent of work, 46days, at $4	184 00
Engineer, running steam-engine, 26 days, at $2	52 00
Watchman, 24½ days, at $1.25	30 62
31 days' hire of steam-engine and pump, at $6	186 00
81,250 bricks, at $10	812 50
185 barrels cement, at $1.45	268 25
Water permit and water rent	10 00
Lanterns, oil, candles, nails, &c	37 16
Wheelbarrow, axes, pipe, spikes, &c	110 31
12 tons coal, at $4.75	57 00
Blacksmithing, &c	4 70
20,000 feet lumber, piling, &c., at $18	360 00
Reloading steam-engine	30 00
	$3,343 72

14 ABSTRACT G.—*Building dam at Virginia avenue, Tiber Creek sewer.*

Carpenter, 11 days, at $3	$33 00
Foreman, 46½ days, at $3	138 75
Laborers, 292½ days, at $1.25	365 31
Horses and carts, 19½ days, at $2.50	43 87
Engineer, 18 days, at $2	36 00
7,560 feet lumber, at $20	151 20
72 1-inch strips lumber, at 20 cents	14 40
Spikes and nails	5 00
	$787 53
Estimated cost of removing same	$150 00
	$937 53

ABSTRACT H.—*Building face of arch, Tiber Creek sewer.*

Stone-cutting:		
Stone-cutters, 14½ days, at $4	$58 00	
Stone-cutters, 76½ days, at $4.75	361 55	
		$419 55
Masons setting face of arch:		
Masons, 15 days, at $4	$60 00	
Laborers, 44½ days, at $1.50	66 75	
Horses and carts, 3 days, at $2.25	6 75	
		133 50
Masons setting coping:		
Masons, 1¾ days, at $4	$7 00	
Laborers, 2½ days, at $1.50	3 75	
		10 75

Masons pointing face of arch:		
Masons, 2 days, at $4	$8 00	
Laborers, 2 days, at $1.50	3 00	
		$11 00
Masons setting sill:		
Masons, 2¾ days, at $4	$11 00	
Laborers, 9½ days, $1.50	14 62	
Horses and carts, 1 day, at $2.50	2 50	
		27 87
Sharpening stone-cutters' tools		13 66
Superintendent of works, 30 days, at $4		120 00
One granite ring		560 49
One granite sill		238 00
One granite coping		268 12
Stone-cutter (dressing), 1 day		4 75
Rubble stone, 12½ perches, at $2.50		31 25
Cement, $1 per perch		12 50
Sand, 10 cents per perch		1 25
		$1,852 69

15 ABSTRACT I.—*Tearing down and rebuilding abutments, tearing up and relaying logs, tearing up and relaying floor, near G street, Tiber Creek sewer.*

Carpenters, 15½ days, at $3	$46 50
Superintendent, 29 days, at $3	87 00
Laborers, 286½ days, at $1.25	357 81
Horses and carts, 12½ days, at $2.50	24 56
Masons, 31½ days, at $4	126 00
Laborers, 87 days, at $1.50	130 50
Horses and carts, 8 days, at $2.50	18 00
30 perches stone, at $2.50	75 00
Cement, $1 per perch	30 00
Sand, 10 cents per perch	3 00
Masonry, laying 30 perches stone, at $1.25	37 50
	$935 87

ABSTRACT J.—*Arch 100 feet high; sundries paid attendant on the arch being too high at Virginia avenue, Tiber Creek sewer.*

Taking out logs:	
Carpenters, 1½ days, at $3.00	$4 50
Laborers, 8 days, at $1.25	10 00
Clearing away earth from between logs:	
Foreman, 5 d's, at $3	15 00
Lab's, 19 d's, at $1.25	23 75
Cutting down logs:	
Carpenter, 1 day	3 00
Laborers, 1 day	1 25
	$57 50

ABSTRACT K.—*Changing and putting in sewer connection "not in plan" and after abutments were built, Tiber Creek sewer.*

Changing position of 18-inch pipe at B street:	
Mason, ½ day, at $4	$2 00
Laborers, ½ day, at $1.50	0 75
Putting in 18-inch pipe at B street:	
Mason, ½ day, at $4	2 00
Laborer, 1 day, at $1.50	1 50
Putting in 4-ft. connection at C street:	
Mason, 2 days, at $4	8 00
Laborers, 4 days, at $1.50	6 00
2 M bricks, at $10	20 00
	$40 25

16 ABSTRACT L.—*Cleaning sewer at Maryland avenue, above point of connection of new sewer, order of Lieutenant Hoxie, Tiber Creek sewer.*

Foreman, 3 days, at $3	$9 00
Laborers, 29½ days, at $1.25	36 87
	$45 87

ABSTRACT M.—*Laying sewer pipe and connections of same at Maryland avenue, Tiber Creek sewer.*

Foreman, 1 day	$3 00
Laborers, 4 days, at $1.25	5 00
Masons, 2 days, at $4	8 0
Laborers, 3 days, at $1.50	4 50
10 perches stone, at $2.50	25 00
Cement, at $1 per perch	10 00
Land, at 10 cents per perch	1 00
	$56 50

30 ft. 12 by 18 inch pipe.

ABSTRACT N.—*Getting stone out of the bank of Tiber Creek.*

1875.	
May 15. Paid R. Burnett, for same	$10 00
July 10. Paid R. Burnett, for same	15 00
	$25 00

ABSTRACT O.—*Iron man-holes, Tiber Creek sewer.*

1 at Maryland avenue	$25 00
1 at E street	25 00
Bricklayer, 2½ days, at $4.50	11 75
	$61 75

17 ABSTRACT P.—*Timber used at Maryland-avenue connection, outside of sewer, Tiber Creek sewer.*

2 pieces 41′ x 10″ x 12″ timber, at $9	$18 00

ABSTRACT Q.—*Increased size of arch, Tiber Creek sewer.*

7,583 perches stone—laying, cement, stone, &c., for same, at $6.50	$49,289 50
82,472 bricks—laying, cement, bricks, &c., for same, at $23	1,896 85
4,700 yards excavation / 2,056 yards earth filling } 6,756 yards, at 40 cents	2,702 40
6,344 feet logs / 37,784 feet flooring } 44,128 feet, at $30	1,323 84
Carpenters' work, spiker, laying floor, &c	1,500 00
	$56,712 59

ABSTRACT R.—*Interest account.*

1874.					
October	1. To 1,653 lineal feet sewer completed to date, at $113				$186,789 00
January	2. By sewer bonds			$6,400 00	
August	19. " certificate dated August 1, 1874			41,390 15	
October	2. " do.	do.	do.	75,007 08	
	13. " do.	do.	do.	22,681 80	
					$145,409 03
					$41,379 97
	31. To 3 months' interest on $41,379.97			$724 15	
	31. " 496 lineal feet sewer completed this month, at $113				$56,048 00
					$97,427 97
November	19. By certificate dated November 1, 1874				63,871 10
					$33,556 87
1875.					
January	14. By certificate dated November 1, 1874				14,300 00
					$19,256 87

18	1874.			
	November 30.	To 1 month's interest on $19,256.87	$112 34	
	30.	To 372 feet sewer completed this month, at $113		$42,036 00
				$61,292 87
December	30.	" 1 month's interest on $61,192.87	$357 54	
	30.	" 217 feet sewer completed this month, at $113		$24,521 00
	1875.			$85,813 87
January	31.	" 1 month's interest on $85,813.87	$500 58	
	31.	" 62 feet sewer completed this month, at $113		$7,006 00
				$92,819 87
February	9.	By certificate dated February 1, 1875		61,794 09
				$31,025 78
	28.	" 1 month's interest on $31,025.78	$180 97	
	28.	" 62 feet sewer completed this month, at $113		$7,006 00
				$38,031 78
March	31.	" 1 month's interest on $38,031.78	$221 85	
	31.	" 31 feet sewer completed this month, at $113		$3,503 00
				$41,534 78
April	30.	" 1 month's interest on $41,534.78	$242 28	
	30.	" 62 feet sewer completed this month, at $113		$7,006 00
				$48,540 78
May	31.	" 1 month's interest on $48,540.78	$283 15	
	31.	" 62 feet sewer completed this month, at $113		$7,006 00
				$55,546 78
June	30.	" 1 month's interest on $55,546.78	$324 03	
	30.	" 62 feet sewer completed this month, at $113		$7,006 00
	1875.			
July	31.	" 1 month's interest on $62,552.78	$364 90	
	31.	" 93 lineal feet completed this month, at $113		$10,509 00
				$73,061 78
19 August	31.	" 1 month's interest on $73,061.78	$426 19	
September	22.	By certificate dated September 1, 1875		$36,426 49
				$36,635 29
	1876.			
January	1.	To 5 months' interest on $36,635.29	$1,069 64	
	29.	By certificates dated January 1, 1876		$2,600 00
			$4,807 62	$34,035 29
		Dr. to interest January 30, 1876		$4,807 62

ABSTRACT S.—*Arch at railroad crossing at Virginia avenue of the Baltimore and Potomac Railroad Company.*

	1875.			
May	31.	Furnishing and driving 22 piles, at $15	$345 00	
		11,242 feet timber, at 2½ cents	281 05	
		Framing caps and stringers on piles	100 00	
		5,479 feet extra timber, at 3 cents	164 37	
		1 watchman, 69 days, at $1.75	110 75	
		275 pounds wrought spikes, at 10 cents	27 50	
		65 iron bolts, at $1	65 00	
		104 feet oak plank for clamps, at 6 cents	6 24	
		Extra labor	150 50	
				$1,250 41
		Removing track stuff, foreman, 1 day, at $3	$3 00	
		Laborers, 7 days, at $1.25	8 75	
				$11 75
June	7.	Material taken by railroad men during freshet:		
		21 perches stone, at $2.50	$52 50	
		3 logs, 10 x 12, at $4	12 00	
		420 feet lumber, at 24 cents	8 40	
				$72 90

1875.

June 18. Tearing down and rebuilding 10 lineal feet of arch to place two additional rings of brick on same:

Masons, 12½ days, at $4	$50 00	
Laborers, 29½ days, at $1.50	44 25	
Horses and carts, 3 days, at $2.50	7 50	
		$101 75

Oct. 2. 2 extra side walls of masonry:

91′ 8″ x 5′ x 12′ 6″ / 67′ 8″ x 5′ x 12′ 6″ } 396¼ perches stone, at $250	$991 25	
Masons, &c., laying same—masons, 83½ days, at $4	330 00	
Laborers, 156½ days, at $1.50 per day	234 75	
Horses and carts, 29½ days, at $2.50	73 75	
Cement used in same, $1 per perch	396 50	
Sand used in same, 10 cents per perch	39 65	
20 Labor excavating foundation for same:		
Foreman, 26½ days, at $3	78 75	
Laborers, 143½ days, at $1.25	179 37	
		2,327 02

Additional height of standing walls:

2′ x 13′ x 68′ 6″ / 2′ x 12′ 6″ x 68′ } 139½ perches of stone, at $2.50	$348 12	
Masonry:		
Laying same, $1.25 per perch	174 06	
Cement used in same, $1 per perch	139 25	
Sand used in same, 10 cents per perch	13 92	
		$675 35

2 extra rings of bricks on 79 feet sewer:

41,589 bricks, at $10	$415 89	
Laying same, at $4	166 35	
103½ barrels cement for same, at $1.50	155 25	
42 loads sand and hauling, at 75 cents	31 50	
		$768 99
Pay of watchman, May 24 to September 23, 122 days, at $1.25		152 50
Pay of carpenters, June 12 to September 16, 82 days, at $2.50		205 00
Pay of superintendent, May 22 to October 2, 114 days, at $4		456 00
Pay of engineer, June 14 to August 25, 72 days, at $2		144 00
3,000 feet lumber used for street piling, at 20 cents		60 00
24 tons coal for engine, at $5		120 00
		$6,345 67
Add 20 per cent. for advancing money		1,269 13
		$7,614 80

The following deductions were made by auditor of the court:

Less material taken during freshet	$72 90	
Less item of tearing down and rebuilding top at arch	101 75	
Less error in extension of item $179.37	31	
Less pay of carpenters, 82 days, allowed 41 days, at $2.50	102 50	
Less pay of superintendent, 114 days, allowed 28½ days, at $4	342 00	
Less pay of engineer, 72 days, allowed 18 days, at $2	108 00	
Less coal, 24 tons, allowed 6 tons, at $3	90 00	
Less 20 per cent. for advancing, allowed 10 per cent	715 31	
	$1,532 77	
Add error in extension of bank's bill $10 00		
Add interest 55 38	65 38	
		$1,467 39
Amount due, as per auditor's account		$6,147 41

WASHINGTON, *November* 1, 1875.

21 II.—*General traverse.*—*Filed Sept.* 6, 1880.

And now comes the Attorney-General, on behalf of the District of Columbia, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney-General.

22 III.—*Plea of set-off.*—*Filed April* 5, 1882.

And now comes the Attorney-General, on behalf of the District of Columbia, and, for a further plea, says:

1. That at and before the institution of this suit the claimants were, and still are, indebted unto the defendant in the sum of $82,176, which the said defendant prays leave to set off and recoup against any demand the said claimants may have against the said defendant. For that the said claimants became indebted unto the said District of Columbia, on or about the 4th day of March, A. D. 1874, for 7,176 perches of stone which the defendant sold and delivered to the claimants, at and for the sum of $1 per perch, amounting to $7,176; but the claimants, though often requested so to do, have not, nor has any one in their behalf, paid the said sum of $7,176, or any part thereof, but so to do have hitherto wholly neglected and refused, which said sum the defendant claims to set off against the said claimants' demand.

2. And for that the said claimants, in and by their said contract sued on in this cause, stipulated and agreed that in the construction of the said work that the inside of the sewer face of the walls should be rough-dressed, and up to the springing of the arch no stones should be less than 8 inches in height, nor less than 5 cubic feet, and that at least one-fourth of the stones should be bond stone; that the skew-back course should be composed
23 of stones of the width of the wall in one dimension, and in length not less than 4 feet; but the defendant avers that in the construction of the said work an inferior class of masonry was substituted by the claimants, and of less cost and value, in this, that the inside sewer face of the walls were not rough dressed, and that no skew-back course of stone was, as above described, used, nor was the masonry constructed of stone of the size of 5 cubic feet or over, nor was one-fourth thereof bond stone, and the defendant avers that by reason of these deficiencies in the construction of the wall, the cost and value of the wall was reduced at least $10 per linear foot, amounting to the sum of $35,000, which sum the defendant claims the right to recoup from the said claimants.

3. And for that by the terms of the contract as aforesaid, and as part thereof, the claimant was bound and required to fill the canal for the whole length of the said sewer, but the said claimants wholly failed so to do, and that the reasonable cost and expense of so doing, which the defendant afterwards was compelled to do, amounting to the sum of $40,000, which said sum the defendant claims the right to recoup and recover of the said claimant.

THOMAS SIMONS,
Assistant Attorney-General.

24 IV.—*Replication.—Filed May 6, 1882.*

And now comes the claimants, and for a replication to the defendant's pleas of set-off says:

1. That the claimants did not purchase the said 7,176 perches of stone from the defendant, and that the claimants are not indebted to the defendant as alleged.

2. That the inside sewer face of the sewer walls were constructed as required by the terms of the contract sued on in this cause. That the stone used in constructing the walls of the sewer up to the springing of the arch was of such character and size as to be acceptable, and was accepted under the terms of the aforesaid contract. That the skew-back course was constructed in a more durable manner, and the material used better suited for the purpose than required by the technical terms of the contract, and were entirely acceptable to the officers in charge of the work.

3. That the claimants did fill the canal where required to do so by the terms of the aforesaid contract.

WOODBURY BLAIR,
Attorney for Claimants.
JOS. G. LOANE,
One of the firm of Gallaher, & Co., Loan.

25 The matters and things set forth in the foregoing replication are true to the best of my knowledge and belief.

——— ———.

Sworn before—
[SEAL.]

——— ———,
Notary Public.

STATE OF MARYLAND,
City of Baltimore, to wit:

On this fifth day of May, A. D. 1882, before the subscriber, a notary public of the State of Maryland, residing in the city of Baltimore, duly commissioned and qualified, personally came Jos. G. Loane, one of the firm of Gallaher, Loan & Co., and made oath that the matters and things set forth in the foregoing replication are true to the best of his knowledge & belief.

In testimony whereof I have hereunto set my hand and affixed my seal notarial the day and year above written.

[SEAL.] W. S. WILKINSON,
Notary Public.

26 V.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

PLAN AND HISTORY OF THE SEWER.

The Tiber Creek, prior to the year 1871, was a natural stream of water flowing through the city of Washington and discharging into what was

then known as the Washington Canal, on Third street west, between Maine and Missouri avenues, and by that in the Eastern Branch.

Among the improvements projected by the Board of Public Works was that of utilizing this stream in connection with the sewerage system of the city, and the general plan adopted was that of constructing a main sewer of masonry and brick-work along its course, through which the stream should flow, receiving and conducting the sewage from lateral connections on either side.

It was constructed for the most part in sections by contract with different parties, and the part here in controversy was the final or outlet section. It was commonly styled the Tiber Creek sewer or arch.

II.

DESCRIPTION OF THE PART OF THE SEWER BUILT BY FORMER CONTRACTORS.

On and before July 14, 1873, a portion of this sewer had been completed, which (so far as is here material) extended from the north side of Pennsylvania avenue, across the Botanical Garden, into Third street, and along and under Third street to a point 3 feet north of the south building line of Maryland avenue, at which terminus the sewer was (so far as here material) of the following construction and size, namely: The side walls were of masonry, about 3 feet high and 5 feet 6 inches thick, supporting an approximate semi-elliptic arch of 30 feet span and 7 feet 10 inches rise. The extrados of the arch, including the skew-back course, was backed up with rubble masonry to the level of its crown.

The timber sleepers for the foundations were 41 feet in length.

27

III.

Contract with Gallaher & Smith.

Proposing to continue the sewer to its outlets with the same construction and size, the Board of Public Works, on July 14, 1873, sent the following written proposal to H. L. Gallaher & Co., consisting of Hugh L. Gallaher and Edwin H. Smith:

BOARD OF PUBLIC WORKS,
Washington, D. C., July 14, '73.

Messrs. GALLAHER & CO.:

GENTLEMEN: The contract for continuing the Tiber sewer from its present terminus at Maryland ave. and 3rd st. SW., along the line of the Washington Canal to its junction with the James Creek Canal, has been awarded to you. The size and manner of construction of the sewer will be the same as that of the portion of the same sewer constructed on 3d st. SW., and will be paid for at the rate of one hundred and thirteen (113) dollars per lineal foot, payable in sewer certificates issued under act approved June 26, 1873, entitled "An act creating drainage and sewerage sections in the cities of Washington and Georgetown, in the District of Columbia, and providing for the payment of the construction of sewers and drains therein by assessments and issuing certificates therefor."

The construction to be begun at the lower end at once, and at least two hundred (200) lineal feet to be completed within thirty days; after the mortar of that section has properly set, the track of the Baltimore and Potomac R. R. to be temporarily located over it and piles driven in the old bed of the Washington Canal so as to allow of the connection of the sewer with the James Creek Canal.

The work to be commenced within ten (10) days, and completed within six (6) months, and subject to the approval of the engineer and inspection of the superintendents.

A penalty of (100) one hundred dollars will be charged for each and every day the work shall be in progress after the expiration of the six months.

You will notify the Board by return mail of your acceptance or rejection of this contract.

Very respectfully,

ALEX. R. SHEPHERD, *V. P.*

These parties replied as follows:

OFFICE 482 PENNSYLVANIA AVENUE,
Washington, D. C., July 14th, 1873.

Hon. ALEX. R. SHEPHERD,
V. President Board of Public Works:

SIR: Your letter of this date notifying us "that the contract for continuing the Tiber sewer from its present terminus at Maryland ave. and 3rd st. SW., along the line of the Washington Canal to its junction with the James Creek Canal, has been awarded to you," has been received.

In reply we have the honor to state that we do hereby accept the contract, subject to all the conditions and requirements set forth in your letter.

Cordially thanking you and your honorable Board for the confidence reposed in us, we pledge ourselves to use every effort and resource at our command to give entire satisfaction, and to complete the work in the most substantial, durable, and skillful manner.

Very respectfully and truly, your ob'd't serv'ts,

H. L. GALLAHER & CO.

A contract, bearing date July 19, 1873, was executed between said parties which (so far as material) is in the same terms as that of the claimants' set forth in the petition, under which Gallaher & Smith commenced the work.

Before they commenced it Sumner H. Bodfish, an assistant under Adolf Cluss, the District engineer, was instructed to give the grade of the sewer, to be laid out with the same dimensions as of the existing sewer, which he did in the summer of 1873. It was proposed, however, to de-
28 viate from the contract, by which the continuation of the sewer was to follow and be laid in the bed of the canal, so as to take it by a curve from the point of connection on the westerly bank and then proceed parallel with and along said bank to the terminus, as shown on the plan annexed to the claimants' contract. This course was recommended by Bodfish, and finally adopted by consent of the parties.

IV.

Claimants buy out Smith and renew the contract.

About the time of giving the grade Gallaher applied for a plan of the sewer showing, among other things, the thickness of the spandrel walls, and said Bodfish made, by direction of the engineer, a plat or working drawing of the structure in transverse section, exhibiting its form and dimensions according to a fixed scale, and representing a structure similar to that of the said completed section at the point of connection aforesaid.

Gallaher & Smith then proceeded with the work in accordance therewith, and completed some part of the excavation, and procured and brought on the ground material, but had not constructed any portion of the arch, when the claimants, Joseph G. and Henry E. Loane, bought out the interest of said Smith, and such proceedings were had that the said contract was, by agreement of the parties, canceled, and a contract in similar terms executed on December 22, 1873, by the said Board with the claimants, as composing the firm af Gallaher, Loane & Co., which contract is set forth in claimants' petition.

V.

Claimants built 680 *feet before the Board of Public Works was abolished.*

The claimants, on entering into said contract, received from said Gallaher & Smith the said working plan. It represented the plan and dimensions of the several parts of the structure of said sewer to be built under their contract, and was similar to the previously completed section with which it was to connect, as provided by the contract, and was the plan under which the work had been commenced and carried on.

They proceeded with the work in accordance with said plan, and without calling the attention of said Board to any alleged or apparent variation of the same from the contract, and constructed the flooring, masonry, and arch according to the dimensions appearing thereon, and had finished about 680 lineal feet thereof when the said Board was abolished by act of Congress of June 20, 1874.

The 680 feet was constructed under the direction of the District engineers, but neither they nor the Board of Public Works intimated to the claimants that the work was not progressing to their satisfaction, and in accordance with the former sample work, in which the skew-back was constructed of rubble masonry.

29 VI.

Change in skew-back directed by Hoxie.

Under the new form of government establised by that act for the District, Richard L. Hoxie was detailed as engineer on July 6, 1874, and forthwith made a careful examination of the work being done by claimants, as to its character and conformity with the specification of the contract, in the presence of one of the claimants.

He found that generally it was being built in conformity with the specifications, but there were several departures. The flooring and sleepers were, as he thought, inferior to the quality required; the masonry was not strictly in conformity with the specifications; there were too few bond stone used;

the inside walls were not dressed, and the stone generally were small. But what attracted his attention and was of the most importance was the manner of constructing the skew-back. It was made of small stones, spalls, and mortar, while it should have been made, as he thought, of large dimension stone. He called the attention of the party present to these alleged variations, and particularly to the skew-back, which he wished constructed of dimension stone. He was informed that to procure the stone would cause considerable delay in the prosecution of the work. Thereupon he directed that the skew-back might be made of brick, and added that he should make a deduction in price, but named no sum. Thereafter claimants proceeded with their work, making the skew-back of brick, under the direction of defendant's engineers, without further complaint.

VII.

Deduction in price and protest.

In August, 1874, the claimants applied for measurement of the work so far as completed, and a partial payment. The engineer, on August 14, 1874, transmitted to the Board of Audit, which, by the act of June 20, 1874, was charged with settlement of such accounts, the following statement, with the measurement requested:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Aug. 14, 1874.

To the honorable BOARD OF AUDIT:

GENTLEMEN: I have the honor to transmit herewith measurement to date upon contract No. 1012, Gallaher & Loane & Co.

With this measurement I submit the following, which, in my judgment, should be deducted from the same: The contract requires the inside (sewer) face of the stone wall rough dressed, and a skew-back stone not less than a 3-foot 6-inch bed, and in length of not less than four feet. These requirements of the contract have not been complied with. The masonry, as required by the contract, was estimated by the late B. of P. W. (and which estimate was made the basis of the contract) thus:

Cost per perch	$7 00
To which was added 25 per cent. for contingencies on account of constructing the sewer in the bed of the stream	1 75
	$8 75

This figure was still more increased by the allowance of $16\frac{4}{10}$ per centum on account of the failure of the Board to pay in cash, thus making the cost per perch of masonry $10.18.

30 The kind of masonry actually built would have been estimated thus:

Cost per perch	$6 00
25 per cent. for contingencies	1 50
	$7 50
$16\frac{4}{10}$ per centum for discount	1 23
Cost per perch	$8 73

Deduct this from the cost ($10.18) of masonry required, exhibits a difference in the value of the masonry of $1.45 per perch, and there being $6\frac{1}{8}$ perches per lin. foot of sewer, of $8.94 per lin. ft. of sewer; total deduction $8.94 \times 496.35 = $4,437.37.

Very respectfully, &c.,

R. L. HOXIE,
Lt. Engineers, U. S. A., and Engineer D. C.

The Board of Audit audited the said account with a deduction of $8.94 per lineal foot from the contract price, in accordance with the statement of the engineer.

The claimants received the partial payment, but filed with the Board of Audit the following protest, by their attorney:

OFFICE BOARD OF AUDIT,
Washington, D. C., Aug. 14, 1874.

To the BOARD OF AUDIT:

Messrs. Gallaher, Loane & Co., whilst protesting against the proposed deduction as recommended by the engineer, ask that certificates may be issued for the amt. he admits to be due, reserving for future consideration the question of the deduction. This is in accordance with the views of the engineer, as I understand them. I proposed to furnish evidence to him against any reduction if he considered that the matter came up now for final settlement. But he declined to receive the testimony on the ground that this would not be a final settlement for so much of the sewer as was now finished.

Respectfully,

MONTGOMERY BLAIR.

The engineer continued to return the various measurements thereafter made to said Board of Audit with a like deduction of $8.94 per lineal foot from the contract price, and the claimants to receive them under their former protest.

VIII.

Length of sewer built and payments.

The portion of the sewer built by the claimants was 3,184.4 feet in length, and at the contract price, $113 a lineal foot, amounted to $359,837.20. Upon this amount the claimants have been paid $324,400.71, leaving unpaid $35,436.49.

IX.

Lateral sewers.

Prior to the construction of said section of the sewer the sewage of the adjacent region was discharged in said canal by lateral sewers, and among these were the following, the outlets of which were in the easterly bank or wall of the canal, namely: A lateral sewer discharging in the canal at Delaware avenue; also, like sewer at C and E streets, at Maryland avenue.

31 After the contract was made a change of location of the sewer from the bed of the canal to its westerly bank was agreed to by both parties, and was supposed to be advantageous to both. The change made it necessary, however, to carry the said lateral sewers across the bed of the canal in order to connect them with the main sewer, and the work of connecting the said sewers was done by the claimants under the following order and direction of the engineer, and is the subject-matter of claims for extra work set forth in abstracts A, B, C, and M, in the petition:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, April 26th, 1875.

Mess. GALLAHER, LOANE & Co., *City:*

GENTLEMEN: You will please commence as soon as the water is turned into the sewer at Md. ave., to take up all connections along the line of the canal, and carry them across the bed of the canal, in order that filling may be commenced at once.

By order of the engineer:

FRANK'N T. HOWE,
Chief Clerk.

The length and cost of these lateral sewer extensions are as follows:

Delaware avenue sewer (Abstract A), 80 feet	$495 32
C street sewer (Abstract B), 73 feet	1,569 25
E street sewer (Abstract C), 170 feet	3,404 12
Maryland avenue sewer (Abstract M), 30 feet	56 50
Total length, 353 feet; total cost	5,525 19

Claimants also made some connections of lateral sewers at B and C streets (Abstract K), at an expense of $40.25. It does not appear that the connections were for the first time required to be made after the abutment walls were built, as alleged.

X.

Apron wall and extra foundations.

The outlet of said sewer was in what is known as the James Creek Canal, the head of which was near but not connected with the said Washington Canal. The flow and fall of the water at said outlet was such that the sewer would not have been left in a complete or safe condition if its terminus had not been constructed with what is called an apron wall, being a wall of masonry supporting the terminus for the water to flow over, and carried down to the bottom of said James Creek Canal, to protect the sewer from being undermined there by the flow and fall of the water. This work was performed by claimants under direction of the engineer, and forms the subject-matter of the claim for extra work set forth in Abstract D in the petition. Cost, $669.50.

As a part of the same construction and for protection of the end of the sewer the abutment walls were supported by extra foundations of masonry and timber on each side back from the terminus, forming the subject-matter of the claim for extra work set forth in Abstract E in the petition. Cost, $530.72.

XI.

By direction of the engineer the claimants constructed a cut-stone façade at the terminus, forming the subject-matter of the claim for extra work set forth in Abstract H in the petition. The reasonable cost was $1,852.69.

32 XII.

Mistake of grade.

The course of the sewer as planned was intersected by the embankment and tracks of the Baltimore and Potomac Railroad at a point near G street, and before undertaking the construction of the sewer through the said embankment, the claimants having constructed the part of the sewer immediately north of said railroad track, applied for and obtained the true grade for 125 feet south of said track, which was surveyed by David E. McComb, and pegs driven along the center line, and a plat of the grade given for the contractor's guidance.

Be some mistake, the fault of the claimants, about 125 feet of sewer was constructed along the line of said grade, but on different and erroneous grade, and when the error was discovered the brick arch had been completed as to a part and as to a part the side of walls of masonry and flooring only.

The claimants were required to rectify the erroneous construction, but were spared the labor and expense of tearing down and rebuilding the completed work, and permitted by the engineer to bring the sewer in that portion to grade by lowering the floor and putting in a brick invert, the expense of which change constitutes the charges for alleged extra work set forth in Abstracts F and I to the petition. Where the arch had not been built the claimants were required to take up the abutments, flooring, and logs so far as laid at the wrong grade, and the expense of this change constitutes the charge for alleged extra work set forth in Abstract I to the petition.

After this work was begun, the engineer changed the plan of it, and the extra cost set out in Abstract I was thus occasioned by the defendant. The amount is $57.50.

XIII.

Temporary dam.

The sewer was completed from the northerly side of the railroad track and connected with the upper section at Maryland avenue, so that the water and sewage ran into the claimant's section, instead of the canal, before the connection through the embankment of the railroad was constructed, and this made it necessary to provide in some way for the temporary diversion of the said water and sewage into the canal above the railroad. This was accomplished by a dam which the claimants built across the sewer for their own convenience in the work, whereby the contents of the sewer were turned into the canal until they could complete the portion below. The expense of this constitutes the charge for alleged extra work set forth in Abstract G to the petition.

XIV.

Cleaning out sewer.

The claimants, at the request of the defendant's engineer, cleaned out a portion of the Maryland avenue sewer before connecting it with the Tiber Creek sewer, at a cost of $45.87. It does not appear that the deposit removed from the sewer was caused by the claimants, nor that its removal was for their benefit or convenience. This constitutes the claim in Abstract S of the petition.

XV.

Man-holes.

Two iron man-holes were built in the sewer by the claimants, at an expense of $61.75. The claim is presented in Abstract O of the petition. All properly constructed sewers have man-holes, and generally about 200 feet apart.

XVI.

Under Baltimore and Potomac Railroad track.

When the work on the sewer was approaching the track of the Baltimore and Potomac Railroad, the company filed its bill in the supreme court of the District of Columbia against both parties to this suit, praying that the claimants provide a temporary support for the railroad track while building the sewer, and build the sewer in such a manner as to furnish a safe, permanent roadway for the running of trains. The claimants were temporarily restrained from proceeding with work on the sewer, and, on the motion to dissolve the restraining order, were required in constructing the sewer to proceed with the work in accordance with the prayer of the bill; the question of the liability for the extra expense thereby incurred being reserved for the final hearing. The work of constructing the sewer under the railroad was done in accordance with this order, and the extra expense of so doing it was reported by the auditor of the court to be $6,147.41. On the final hearing before the court below it was decreed that the Baltimore and Potomac Railroad Company was not liable for this sum, and on appeal to the general term the decree was affirmed.

This claim is presented in Abstract S of the petition.

XVII.

At the Maryland avenue connection the claimants furnished at the request and for the use of the defendant, two sticks of timber worth $18. It does not appear to have been required by the contract. The claim is presented in Abstract P of the petition.

COUNTER-CLAIM.

XVIII.

Stone in the canal.

In the banks of the old canal was a quantity of stone estimated by the engineer, at 7,176 perches, belonging to the defendant. In relation thereto the following correspondence occurred:

WASHINGTON, *Feb'y* 20, '74.

Hon. HENRY WILLARD,
Vice-President of B. of Public Works:

DEAR SIR: We will pay you one dollar per perch for all the stone in the old canal from Maryland avenue to the mouth or terminus of the canal.

Respectfully, your ob'd't servants,

GALLAHER, LOANE & CO.

34 MARCH 10, 1874.

Messrs. GALLAHER, LOANE & Co.,
No. 356 Missuori avenue:

SIRS: In reply to your letter of the 20th ult., offering $1 per perch for stone in the old canal from Maryland ave. to the terminus of the canal, I am directed by the Board to inform you that your offer for the stone is accepted, but in removing the same the old channel must not be obstructed thereby until the new sewer is ready to receive the drainage.

Very respectfully,

CHA'S S. JOHNSON,
Secretary.

It does not appear that the claimants had any need of the stones or any purpose in the purchase of them other than to use them in the walls of the sewer.

The claimants dug out from the banks of the canal about 100 perches of stone and began to lay them in the walls of the sewer. They did not prove to be fit for these walls, and the engineer forbid their use. Thereafter no more stones were taken by the claimants. A few that were dug out of the banks and not used in walls, were subsequently used by the defendant. The remainder were left as before in the banks of the canal which was under the control of the defendant. What became of them does not appear.

To dig out these stones cost the claimants $25, which amount they have charged up to the defendant in Abstract N.

Steam pump, sewer-pipe, and gravel.

The defendant sold to the claimants one steam pump for $1,000, a quantity of sewer-pipe for $366.50, and gravel for $12.50. No arrangement appears to have been made for the payment of these items, from which it appears that it was the intention of the parties that they should be credited upon the contract.

XIX.

The claimants did not fill the Washington Canal from a point 40 feet north of the north part of the sewer to the south end thereof, but did fill against the sewer walls in its new location.

The reasonable cost of filling the canal was $12,711.

CONCLUSIONS OF LAW.

Upon the foregoing findings of facts the court decides as conclusions of law:

That the claimants are entitled to recover upon their several claims the sum of $43,935.74.

That the defendant is entitled to recover upon the counter-claims the sum of $1,479.

That upon the whole case the claimants are entitled to judgment in the sum of $42,456.74, due and payable as of January 18, 1876.

35 VI.—*Opinion of the court.*

SCOFIELD, J., delivered the opinion of the court:

December 22, 1873, the claimants contracted with the Board of Public Works to build the unfinished part of the Tiber Creek sewer. Under this contract they constructed 3,184.4 lineal feet. The contract price was $113 a lineal foot. The work done at this rate amounted to $359,837.20. They were paid thereon $324,400.71, leaving an unpaid balance of $35,436.49.

The defendant objects to the payment of most of this balance, and claims that in the construction of the sewer the claimants made certain variations from the specifications of the contract, whereby the cost to them and the value to the defendant was lessened at the rate of $8.94 a lineal foot. The whole amount of deduction claimed on this account is $28,468.53. This defense will be considered in connection with the next stated item of the claimants' demand.

Under instructions of the defendant's engineers, claimants built the arch of the sewer 7½ feet in height, laid the foundation timbers and planking 41 feet in length, and built the abutment walls 5½ feet thick; whereas the contract required 1 foot less for the height of the arch, 4 feet less for the length of the foundation timbers and planking, and, as they allege, 2 feet less for the thickness of the abutment walls. This enlargement of the sewer cost the claimants $56,712.59.

Before examining these two items of the claim and the defenses thereto, it is proper to observe that the contract is very imperfectly drawn. It provides that the arch shall have a 30-foot span and the abutment walls shall be 5½ feet thick, but the foundation timbers and planking shall be 37 feet long. It provides that the abutment walls shall be built upon the timbers and planking, but the latter shall extend only from the inside of one wall to the outside of the other. It provides that the rise of the arch shall be 6 feet 6 inches, and shall correspond in size to arch already built, which had a rise of 7 feet 10 inches. It provides that the skew-back course shall be of the same thickness as the abutment walls, to wit, 3 feet 6 inches,

although it elsewhere provides that the abutment walls shall be 5 feet 6 inches in thickness. Some things that should appear in the specifications are entirely omitted, and some things that do appear are stated in very doubtful language. Apparently the scrivener wrote the contract without fully knowing what the parties had agreed upon, and the parties signed it without fully knowing what the scrivener had written.

Fortunately, there is one clause in the contract which, with the action of the parties thereunder, enables us to ascertain their intention.

The sewer had already been partly constructed by other parties. The claimants were to begin where they left off. The construction and size of the new work by the terms of the contract were to be similar to the old. The abutment and skew-back walls of the sample work here referred to and called for were 5 feet 6 inches in thickness; the sleepers were 41 feet in length, extending from outside to outside of the abutment walls, and the skew-back course was built up of rubble masonry. The defendant furnished a working plan for the claimants to follow, which, so far as it went, corresponds so the work of the sample. The claimants, without objection or other requirements of the defendant, constructed the sewer substantially in accordance with this working plan and the sample work. They did what apparently they supposed the contract required them to do, and thus furnished us with their understanding and construction of it.

36

Thus the claimants proceeded with their work until about 680 feet had been completed. It was done under the supervision of Mr. Cluss, the District engineer, and his assistants. No complaint was made on either side. The contractors seemed content to make the enlargement and the defendant content with the quality of the work. Both, it is believed, substantially followed the sample and the working plan, but in some respects differed from the provisions of the contract.

Then came the act of June 20, 1874, by which the Board of Public Works was abolished and Commissioners appointed. Lieutenant Hoxie, of the Army, was detailed as District engineer. His first business was to examine the Tiber Creek sewer. It does not appear that he ever examined the sample work. He saw, however, that the work was not being done as well as the contract required. He particularly objected to the skew-back course. He required, as did the contract, the use of dimension stone. He was informed that the procurement of such stone would cause delay. He finally directed them to construct it of a certain kind of brick-work. At the same time he notified the person in charge, supposed to be one of the claimants, that he should make a deduction in price, but named no amount. He reported his action to the Commissioners, who made no objection. Thereafter the work proceeded to completion under Lieutenant Hoxie's direction.

When the engineer came to make estimates for partial payments he deducted $8.94 a lineal foot for this change in the work. The claimants protests, and the dispute remains unsettled.

Here, then, are two important variations from the written contract, one in the size of the sewer and the other in the quality of the work. The one to the disadvantage of the claimants and the other to the defendant. Both were according to the working plan, so far as it went, and according to the sample. In this way 680 feet were completed to the apparent satis-

faction of both parties. The new engineer did not forbid the work to proceed, but required it to proceed on a plan of his own, to which the claimants conformed. To be sure, he said he should make a deduction in the price, but to this the claimants did not assent. It was not made as a condition of allowing them to proceed, but to save time and facilitate the work. It was for the defendant's convenience, to avoid delay. We think the work was done, substantially, in conformity to the sample work and the working plan, and therefore reject the claimants' demand for $56,712.59, on the one hand, and the defendant's deduction of $28,468.53 on the other.

By direction of the defendant's engineer the claimants constructed four lateral sewers, whose united length was 353 feet, and whose united cost was $5,525.19. The facts are stated in Finding IX. The defendant claims that the claimants were bound by their contract to make these sewers at their own expense. The contract provides that "all the connections for lateral sewers must be made when and as directed by the engineer." This certainly requires the claimants to leave proper openings in the Tiber Creek sewer and join the lateral sewers thereto, but not to construct 373 feet of sewerage in order to bring the several parts within joining proximity. It was in contemplation of the original contract to build the
37 Tiber Creek sewer along and near to the outlets of these lateral sewers. Its location was subsequently changed by agreement of the parties. It is said that this change was so favorable to the claimants that they could well afford to construct the extensions under the contract price. That may be so, but as the parties did not so agree the court cannot supply the omission by a strained and arbitrary construction. The defendant should pay the claimants the reasonable cost, which is $5,525.19, as appears in Finding IX.

The claim of $40.25, also presented in Finding IX (Abstract K), should not be allowed because it was required by the contract. The finding disproves the allegation that the connections were not ordered until after the abutment wall was constructed.

The Tiber Creek sewer discharges into the James Creek Canal with a fall of 7 or 8 feet. The ground at this point is composed of sand and soft earth. To protect it against the flow and fall of the sewer drainage, the claimants built, by direction of the engineer, extra foundations for the abutments and a perpendicular apron wall of masonry at right angles to the sewer and underneath the terminal sleepers. The one cost $669.50 and the other $530.72. This work was absolutely necessary to prevent the sewer from being undermined. Which party shall pay for it? The grade of the sewer was given when the contract was made. By the terms of the contract the claimants were required "in a good, firm, and substantial manner * * to build and complete * * * the sewer." The $113 a foot was to be paid—

"As full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects complete the same."

In the judgment of the court this work was necessary for the completion of the sewer "in a good, firm, and substantial manner." The claimants were properly required to make it at their own cost. The facts are stated in Finding X.

The claimants also constructed, at defendant's request, as shown in

Finding XI, a cut-stone façade at the terminus of the sewer at an expense of $1,852.69. It was merely ornamental, not required by the contract, and the defendant should pay for it.

In Abstracts F and I of the petition the claimants present two bills, the one for building a brick invert, and the other for tearing down and rebuilding certain abutments. This work was done to correct a mistake in the grade, not discovered until after considerable progress had been made in the work. The party in fault must bear the loss. It appears by Finding XII that it was a mistake of the elaimants. The portion of this expense set out in Abstract I, amounting to $57.50, was occasioned by a change in plan by defendant's engineer, and this amount should be paid by the defendant.

The claimants built a dam at Virginia avenue to divert the drainage of the sewer into the old Washington Canal at that point, to enable them the better to work at and complete the portion below. It appears to have been done for their own convenience. For this reason, and also by the requirement of paragraph 6 of the contract, they must bear the expense of it. The facts are stated in Finding XIII.

The claim of $45.87 for cleaning Maryland avenue sewer was for
28 work done at the instance and for the benefit of the defendant, and was extra to the contract. It should be allowed.

The claim for the cost of man-holes, as shown in Finding XV, must be rejected. It is not extra work. The claimants were required by their contract "to complete the sewer in a good, firm, and substantial manner." Without man-holes it would be neither good nor complete.

The claimants present a bill of $6,147.41 for extra expense in constructing the sewer under the track of the Baltimore and Potomac Railroad.

The contract contains these words:

"It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements or from incumbrances or injuries to individuals, property, or otherwise on the line of the work or adjutant thereto, shall be sustained by the said contractors."

The claimants thus covenanted to sustain all loss arising out of injuries to property, and the decree above referred to settles the question that the disturbance of the Baltimore and Potomac Railroad line was an injury to the company's rights of property. It is very probable that neither of the parties at the time of the contract took that view of the railroad's right, but that fact cannot affect the construction of the contract.

The claim of $25 for getting out stone from the banks of the canal, as shown by Finding XVIII (Abstract N), cannot be allowed, because it was not done at the request nor for the benefit of the defendant.

The claimant furnished at the request and use of the defendant, as appears in Finding XVII, two sticks of timber valued at $18, which does not appear to have been required by the terms of the contract. This amount should be allowed.

The defendant charges the claimants with a quantity of stone estimated at 7,176 perches. It appears by the correspondence shown in Finding XVIII that the claimants proposed to purchase the stone at $1 a perch, and that the defendant accepted the offer with a slight modification. The

claimants appear to have been satisfied with the modification, for they soon began to get out the stone and actually removed about 100 perches. The purchase was apparently made in the belief and expectation of both parties, though not expressed in the correspondence, that the stone could be used in the construction of the sewer. It does not appear that claimant had any other use for them. After a few had been dug out from the canal banks and some of them placed in the walls, the defendant discovered that they were not fit for the work and forbade their use. The claimants took no more. The stones dug out of the bank and not put in the sewer were afterwards used by the defendant. The remainder were left in the banks of the canal, which was under the control of the defendant. What became of them does not appear.

The court holds that the claimant should only be required to pay for the stone actually taken, which amounted to $100.

The claimants purchased of the defendant a steam pump for $1,000, a quantity of sewer-pipe worth $366.50, and some gravel worth $12.50; in all, $1,379. As no provision was otherwise made for the payment, it is to be presumed that it was intended to be credited upon the contract. For this reason the amount should be deducted from the claim.

39 The defendant claims $12,711 damages for the failure on the part of the claimants to fill up the old canal. The clause of the contract relied upon to sustain this item of the counter-claim is as follows:

"The contractors will be required to procure at their expense all the filling required to close the canal at the sides of the above-named sewer for the width of Third street, and from a point of forty (40) feet north of the north part of the sewer to the south end thereof, and to the depth of two (2) feet above the crown of the masonry as shaded in the plan."

By the original contract the sewer was to have been built in the bed of the old canal. In that case the claimants were required to fill up the narrow spaces between the walls of the sewer and the banks of the canal. When the location of the sewer was changed this provision had no application to the canal, but became applicable to the sides of the sewer as elsewhere located. There is no complaint that this filling was not properly done. This item of the counter-claim cannot be allowed.

By these conclusions of the court the claimants are entitled to recover upon their several claims the sum of $43,935.74. The defendant is entitled to recover upon the several counter-claims the sum of $1,479. Upon the whole case the claimants are entitled to judgment in the sum of $42,456.74 due and payable January 18, 1876.

The chief justice and Judge Weldon dissented.

40 VII.—*Final judgment.*

At a Court of Claims held in the city of Washington on the 26th day of May, A. D. 1884, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said Hugh L. Gallaher, Joseph G. Loane, and Henry E. Loane, under the firm name and style of Gallaher, Loane and Company, do have and recover in the manner provided by the act of June 16th, 1880, the sum of forty-two thousand four hundred

and fifty-six $\frac{74}{100}$ dollars ($42,456.74) upon debts of the District of Columbia due and payable January 18th, 1876, within the meaning of the sixth section of the said act.

41 VIII.—*Application for and allowance of appeal.—Filed Aug.* 22, 1884.

From the judgment rendered in the above-entitled cause on the 26th day of May, 1884, in favor of claimants, the defendant, by the Attorney-General, on the 22d day of August, 1884, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Allowed.

C. D. DRAKE, *C. J.*

42 In the Court of Claims.

IX.

HUGH L. GALLAHER, JOSEPH G. LOANE, and Henry E. Loane, under the firm of Gallaher, Loane & Company.
vs.
THE DISTRICT OF COLUMBIA. } No. 21.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief-Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 28th day of August, A. D. 1884.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 425. The District of Columbia, appellant, vs. Hugh L. Gallaher, Joseph G. Loane & Henry E. Loane, doing business under the firm name of Gallaher, Loane & Company. Court of Claims. Filed 20th October, 1884.



124-505

124-505

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE DISTRICT OF COLUMBIA, appellant, *v.* HUGH L. GALLAGHER, JOSEPH G. Loane, and Henry E. Loane, doing business under the firm name of Gallagher, Loane & Co.	No. 141.

ASSIGNMENT OF ERROR AND BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE DISTRICT OF COLUMBIA, appellant,
v.
HUGH L. GALLAGHER, JOSEPH G. LOANE, and HENRY E. LOANE, doing business under the firm name of Gallagher, Loane & Co. } No. 141.

ASSIGNMENT OF ERROR AND BRIEF FOR APPELLANT.

STATEMENT.

Gallagher, Loane & Co. brought suit in the Court of Claims to recover for certain work connected with the building of the lower or outlet section of the Tiber Creek sewer. Tiber Creek, prior to the year 1871, was a natural stream of water flowing through the city of Washington and discharging into what was then known as the Washington Canal, on Third street west, between Maine and Missouri avenues, and by that into the Eastern Branch. Among the improvements projected by the Board of Public Works was that of utilizing this stream, in connection

with the sewerage system of the city; and the general plan adopted was that of constructing a main sewer of masonry and brick work along its course, through which the stream should flow, receiving and conducting the sewerage from lateral connections. This sewer was constructed in sections by contract; and the part to be considered in the controversy here was the final or outlet section. On and before July 14, 1873, a portion of this sewer had been completed to a point at which the work to be done under the contract, hereinafter mentioned, was to be commenced.

This completed portion was of the following construction and size: The side walls were of masonry about 3 feet high and 5 feet 6 inches thick, supporting an approximate semi-elliptic arch of 30 feet span and 7 feet 10 inches rise. The extrados of the arch, including the skew-back course, were backed up with rubble masonry to the level of the crown. The timber sleepers for the foundation were 41 feet in length. It will be seen further on that these dimensions differed materially from those prescribed in the specifications of the contract executed by these claimants.

On that date (July 14, 1873) a contract was awarded by the Board of Public Works to Hugh L. Gallagher and Edwin H. Smith for the construction of this final or outlet section, which contract was accepted by Gallagher & Smith, and, on July 19, 1873, executed between said parties. Before they commenced work an assistant district engineer was instructed to give the grade of the sewer to be laid out in the same dimensions as of the existing sewer, which he did. It was proposed, however, to deviate from the contract, by which the continuation of the

sewer was to follow and be laid in the bed of the canal, so as to take it by a curve to a point of connection on the westerly bank, and then proceed parallel with and along said bank to the terminus, as shown on the plan annexed to the claimant's contract. This course was recommended by the assistant engineer and finally adopted by consent of the parties. About the time of giving the grade the contractors applied for a plan of the sewer, showing among other things the thickness of the spandral walls, and were furnished, by direction of the engineer, a plat or working drawing of the structure in transverse section, exhibiting its form and dimensions according to a fixed scale, and representing a structure similar to that of the said completed section at the point of connection aforesaid. The contractors proceeded with the work in accordance with this working plan, completed some part of the excavation, procured and brought on the ground some working material, but had not done any work in and about the construction of the arch, when, on or about December 22, 1873, with the understanding and consent of all parties interested, Smith sold his interest to Joseph G. Loane and Henry E. Loane, two of the present claimants. A new contract, supplemental to and continuing the old one, and similar in its language and covenants, was at that time entered into between the Board of Public Works and the substituted contractors, who are the claimants in the present suit. (Transcript, pp. 2 to 7.)

The specifications for the work embraced in the written contract contained a general provision that "the construction and size of the sewer is similar to the one" already

completed. But the specifications also contained detailed and comprehensive directions as to the character of the materials and work. (Transcript, pp. 3 and 4.)

The claimants on entering into this contract received from Gallagher and Smith the working plan. It represented the plan and dimensions of the several parts of the structure of said sewer to be built under their contract, similar to the previously completed section, of which it was to be the continuation, and was the plan under which the work had been commenced and carried on. The work was proceeded with in accordance with this plan, and without calling the attention of the Board to any alleged or apparent variations from the contract, until June 20, 1874, when the said Board was abolished. Six hundred and eighty feet of the flooring, masonry, and arch, according to the dimensions appearing on the working plan, had been constructed prior to this time under the direction of the District engineers; but neither they nor the Board of Public Works intimated to the claimants that the work was not progressing satisfactorily, and in accordance with the former sample work in which the skewback was constructed of rubble masonry.

Under the new form of government established for the District, Lieutenant Hoxie was detailed as engineer, and forthwith made a careful examination of this work. He found several departures from the specifications.

He found that generally it was being built in conformity with the specifications, but there were several departures. The flooring and sleepers were, as he thought, inferior to the quality required; the masonry was not strictly in conformity with the specifications; there were

too few bond stone used; the inside walls were not dressed, and the stones generally were small. But what attracted his attention and was of the most importance was the manner of constructing the skewback. It was made of small stones, spalls, and mortar, while it should have been made, as he thought, of large dimension stones. He called the attention of the party present representing the contractors to these alleged variations, and particularly to the skewback, which he wished constructed of dimension stone. He was informed that to procure the stone would cause considerable delay in the prosecution of the work. Thereupon he directed that the skewback might be made of brick, and added that he should make a deduction in price, but named no sum. Thereafter claimants proceeded with their work, making the skewback of brick, under the direction of defendant's engineers, without further complaint.

In August, 1874, the claimants applied for measurement of the work so far as completed, and for a partial payment. Hoxie made the measurement and transmitted a statement to the Board of Audit, in which he detailed the instances in which the requirements of the contract, as set forth in the specifications, were not complied with. He estimated the difference in values between the work as required and the work as performed to be $8.94 per lineal foot against work performed, and made a deduction of that amount.

The Board of Audit audited the account in accordance with this statement of the engineer. The claimants received the audited amount under protest as a partial payment. The engineer continued to return the various

measurements thereafter made to the Board of Audit with the same reduction from the contract price, and the claimants continued to receive the amounts audited, still under protest. There were built 3,184.4 lineal feet of sewer, which at the contract price would amount to $359,837.20. Of this amount the claimants have been paid $324,400.71, leaving unpaid $35,436.49. The amount of deduction by the engineer and Board of Audit was $28,468.53. It is to be noted, however, that the payments above referred to were to be applied to the payment for all work done in and about this sewer and its extensions by the contractors.

Prior to the construction of this outlet section of the sewer, the sewage of the adjacent region was discharged into said canal by lateral sewers, and among these were the following, the outlets of which were in the easterly bank of the canal, viz: a lateral sewer discharging in the canal at Delaware avenue; also lateral sewers at C street and E street at Maryland avenue. After the contract was made a change of location of the sewer from the bed of the canal to its westerly bank was agreed to by both parties, and was supposed to be advantageous to both. The change made it necessary, however, to carry the said lateral sewers across the bed of the canal in order to connect them with the main sewer; and the work of connecting the said sewers was done by the claimants under the order and direction of the engineer, and is the subject-matter of claims for extra work, amounting to $5,525.19.

By direction of the engineer the claimants constructed a a cut-stone façade at the terminus, which is the subject-matter of a claim for extra work, amounting to $1,852.69.

By a mistake of the claimants a portion of the sewer

was constructed on an erroneous grade. By direction of the engineer the contractors rectified this error; but in doing so, by a change of plan on the part of the engineer, were required to perform some work which is the subject-matter of a claim for extra work, amounting to $57.50. The claimants, by direction of the engineer, cleaned out a portion of the Maryland avenue sewer before connecting it with the Tiber Creek sewer, which is the subject-matter of a claim for extra work, amounting to $45.87. The claimants, at the request of the defendant, furnished timber, not required by the contract, of the value of $18.

These above-stated items appear to make up the aggregate amount which the court decided as a conclusion of law that claimants were entitled to recover upon their several claims. They may be stated as follows:

1. Balance unpaid on the contract	$35,436.49
2. Additional work for construction of lateral sewers	5,525.19
3. Construction of cut-stone façade	1,852.69
4. Extra work in rectifying grade	57.50
5. Timber furnished	45.87
6. Cleaning out Maryland avenue sewer	18.00
Total	43,935.74

(There appears to be an error of calculation in the amount found by the court, taking the opinion as the guide for the calculation.)

The defendant filed, in addition to the general traverse to claimants' petition, a plea of set-off in the sum of $82,176, of which amount the court decided, as a conclusion of law, that it was entitled to recover $1,479; which appears to have been arrived at as follows:

For stone taken from canal-bank	$100
For steam-pump, sewer-pipe, and gravel	1,379

Upon the whole case judgment was entered for the claimants in the sum of $42,456.74.

ASSIGNMENT OF ERRORS.

I.

The Court of Claims erred in deciding that the claimants were entitled to recover upon their several claims the sum of $43,935.74.

II.

The Court of Claims erred in not entering judgment for the defendant upon the counter-claim for the full amount therein claimed.

III.

The Court of Claims erred in entering judgment upon the whole case for the claimants.

BRIEF.

In the act establishing the Board of Public Works it is provided that—

> All contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District. (16 Stat. L., 427.)

In conformity with these provisions, the contracts with Gallagher and Smith and with Gallagher, Loane & Co.,

for building a portion of Tiber Creek sewer, were entered into. Before any work was done under the first contract, a material variation was made in ths course of the sewer by providing for its construction on the westerly bank, instead of in the bed of the canal. This caused a difference in the character of much of the work to be performed. And yet, when the second contract was executed, although it recognized the departure from the bed to the bank, it contained all the requirements and descriptions of building in the bed; such, for instance, as filling the ground against the sides of the sewer and procuring the filling and closing the canal and making the connections for lateral sewers. (Contract, Tr., p. 4; Findings, p. 19.)

No work in the actual construction of the arch was done until after the execution of the second contract. It clearly appears from the findings of the Court of Claims that this construction was widely variant from the specifications of the contract. The size of the sewer, the material used, the filling against the sides, the connections—all were different. By the tenth clause of the contract the price to be paid was conditioned upon furnishing all the materials and labor which might be required in the prosecution of the whole of the work to be done under the agreement, and in all respects completing the same; and this price, in full compensation, was to be $115.39 per lineal foot of the sewer. (Tr., p. 6.)

This suit is brought upon the written contract; and the petition and replication aver compliance with the terms of the contract. It may be admitted that the form of pleading would not preclude the claimant from recovering what is justly due to him upon the facts stated in the pe-

tition, although due in a different aspect from that in which his demand is ~~concerned~~ considered. (*Clarke* v. *United States*, 95 U. S. R., 539, 543.) The contract here was rescinded. It was not performed according to the terms of the agreement. It was entire and the price specifically agreed upon. But the claim of petitioners is made up of separate charges for distinct classes of work, all of which were embraced in the written specifications of the contract for the construction of the sewer. The work was performed and accepted by the District. The contention of the defendant is that the court below erred in the application of a rule for determining the compensation which claimants were entitled to.

The Court of Claims seem to have awarded $35,436.49 as a balance due for the construction of 3,184.9 feet of sewer at $113 per lineal foot according to the contract (Tr., p. 22). The findings of fact show, as we have seen, that the sewer built was different in size and the material used from the one required (Findings II and VII, pp. 18, 21). It is claimed that the terms of the agreement permitted a latitudinarian discretion by the contractors, because a clause therein stated that "the construction and size is similar to the one (sewer) running from the north side of Pennsylvania avenue to Third street west, at the beginning of the extension"; and because the working plan furnished by the engineer was followed in the construction. Making allowance for the carelessness and negligence with which everything connected with this business was done, from the first ~~draught~~ draft of an agreement under the statute to the examination and measurement by Hoxie, no such radical changes as were made could be

sanctioned. For the change of course had been determined on and the working plan delivered six months before the execution of the agreement under which recovery is sought, and no work of construction of the arch had been commenced. It is difficult to see how the nominated price can be taken into consideration in estimating the value of the work done on the arch except as a starting point for comparison. For there are facts in the findings (Findings V, VI, and VII, pp. 20, 21) which might guide the court. When Lieutenant Hoxie was called in to examine and measure the work, he directed attention to the deficiences in it and its want of conformity to the specifications. He took the estimate of the Board of Public Works, by which the specific price was fixed, showed how it was arrived at, and, applying this standard to the masonry actually built, found its cost to be $8.94 less per lineal foot than the contract price. He therefore recommended that deduction from the original payment, and it was made; and so were all the subsequent payments made, the board of audit deducting $8.94 from $113 for each lineal foot. This is all the testimony in the record showing or tending to show what the work was worth.

But the Court of Claims allowed $113 per lineal foot for the masonry of the arch. And in the deductions made by Hoxie he confined himself to a consideration of the inferiority of the materials used and work done on the arch. The other items going to make up the aggregate of the judgment are for "lateral sewers" and extra work. These lateral sewers were the connections required in the written contract. The findings (Finding IX, p. 23) show the length and cost of these sewers. But the

contract required (p. 4) "all the connections for lateral sewers must be made where and as directed by the engineer." The specified price was for the entire work. That having been allowed by the court in the first item for construction, taking the written agreement as evidence merely, it was manifestly improper to allow for building these connections. It has been seen that the deduction made by the engineer was only on account of the inferiority of the masonry.

By the terms of the written contract, the contractors were "required to procure at their expense all the filling required to close the canal at the sides of the above-named sewer for the width of Third street, and from a point of forty feet north of the north part of the sewer to the south end thereof, and to the depth of two feet above the crown of the masonry as shaded in the plan." The court found that the reasonable cost of filling the canal was $12,711 (Finding XIX, p. 27). It is claimed that the contractors were not expected to perform this work because the sewer was not built in the bed of the canal. But the sewer they contracted to build was not to be in the bed of the canal; they were "to excavate for, build, and complete the continuation * * * along a line parallel to the line of the old Washington canal." The change in the course was made months before they executed this writing. And if the price named in this contract is to be regarded as affording any guide in the ascertainment of the damages under a *quantum meruit*, then these deductions for worth of that which was required to be done and not performed must be made. If payment is to be made for work done, the damages may be reduced for failure to

perform what was promised. This amount should have been allowed on the counter-claim.

It is respectfully submitted that in whatever light this contract, unsatisfactory in its expression and performance, is viewed, the Court of Claims erred in its conclusions of law, and in rendering judgment for claimants in this suit.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD.
Assistant Attorney-General.

124-5

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 141.

THE DISTRICT OF COLUMBIA

vs.

GALLAHER, LOANE AND COMPANY.

APPELLEES' BRIEF.

TH. HUGHES,
WOODBURY BLAIR,
For Appellees.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 141.

THE DISTRICT OF COLUMBIA

vs.

GALLAHER, LOANE AND COMPANY.

APPELLEES' BRIEF.

The subject-matter of this appeal will be considered in the following order:

1st. The allowance of the appellees' claim for thirty-five thousand four hundred and thirty-six dollars and forty-nine cents, being the difference between the total of the contract price of the work and the total sum received.

2d. The allowance of the appellees' claim of five thousand five hundred and twenty-five dollars and nineteen cents for constructing certain lateral sewers across the old Washington canal, from the east side thereof, where they emptied, to and beyond the west side, where the Tiber-creek sewer was located.

3d. The allowance of the appellees' claim of one thousand eight hundred and fifty-two dollars and sixty-nine cents for an ornamental cut-stone façade at the terminus of the sewer.

4th. The allowance of the sum of fifty-seven dollars and fifty cents, forty-five dollars and eighty-seven cents, and eighteen dollars, stated in findings 12, 14, and 18, pages 24 and 25 of the record.

5th. The disallowance of twelve thousand seven hundred and eleven dollars, which the appellants claimed as the reasonable cost of filling the old Washington canal.

The Allowance of Claim for $35,436.49 *Retained from Contract Price.*

A firm of contractors, known as Gallaher & Smith, had contracted with the Board of Public Works of the District of Columbia to finish an incompleted work, known as the Tiber-creek sewer, in the city of Washington, commencing at a point where the sewer had been built by a former contractor, and carry it to its terminus (p. 18, findings 3, 4). When the Loanes assumed Smith's interest and came in the work with Gallaher, under the firm name of Gallaher, Loane & Company, there was no intention on the part of the Board of Public Works to change their sectional plans for the sewer (p. 28), and the appellees, without objection or other requirement of the Board of Public Works, constructed a sewer substantially in accordance with the working plan and sample of work referred to in specifications, under the direction and supervision of appellant's engineer. The contract executed by and between the appellants and appellees was similar in terms to the Gallaher-Smith contract (p. 20, finding 4), but the specifications accompanying this contract were impossible of execution, inconsistent, and contradictory and differed in many respects from the working plans (p. 27).

The appellant continued to exact from the appellees the original dimensions and mode of construction until some time after July 6, 1874 (p. 20, finding 5).

The specifications required The appellees agreed to construct a sewer in which the sleepers of the foundation should be white pine, thirty-seven feet long, the semi-elliptic arch should have a rise of six feet six inches, and the skew-back course was to be constructed of blocks, in length not less than four feet. (See p. 3.)

The work and material were to be subject to the examination of an inspector of appellants, and payments were to be made upon the certificate of the engineer of the Board of Public Works. (Art. 8.)

Originally the contract had been tendered by the appellants, in which tender it was stipulated that the size and manner of construction of the sewer would be the same as that then completed, and it was so accepted by the appellees. After the execution of the contract, and before the appellees commenced work, an assistant under the District engineer was instructed to give the grade of the sewer, to be laid out with the same dimensions as of the existing sewer, and which was of the same plan (finding 3, p 19).

Six hundred and eighty feet of the work was then constructed under the direction of the District engineer, and without dissatisfaction (finding 5). Under these dimensions and plan the sleepers were forty-one feet instead of thirty-seven, and the arch had a rise of seven feet ten inches instead of six feet six inches and the skew-back was constructed of rubble masonry. (See opinion, p. 27.)

When the government of the District changed (act 20 June, 1874) the new engineer objected to the skew-back course and directed it to be made of dimensions stone, and

when told that delay would be caused in procuring the stone he directed it to be made of brick, stating he would make a deduction in price, but named no sum, and it was thereupon constructed of brick. (Finding 7; protest, p 22.)

The reduction as made by said engineer ultimately amounted to twenty-eight thousand four hundred and fifty-eight dollars and fifty-three cents, and as partial payments were made to appellees they accepted the same under protest against any reduction. The enlargement of the sewer, on the other hand, beyond the contract dimensions had cost the appellants fifty-six thousand seven hundred and twelve dollars and fifty-nine cents.

The total of the contract price was three hundred and fifty-nine thousand eight hundred and thirty-seven dollars and twenty cents and the total sum received was three hundred and twenty-four thousand four hundred dollars and seventy-one cents, leaving the difference of thirty-five thousand four hundred and thirty-six dollars and forty-nine cents still unpaid.

The sewer which the appellees commenced to construct deviated from the specification, but not from the plan of the contract. The deviation occurred, however, in consequence of the appellees' conforming to the working plan furnished by an employé of the appellant, instructed to furnish the plan he did. The deviations were in the length of the sleepers, the height of the arch, which benefited the defendant, and the material in the skew-back courses, which conformed to the model. When the change of government occurred (June, 1874) and the engineer, Mr. Hoxie, took charge, the deviations were still continued, the character of deviation in the skew-back being changed. Up to

that time about one-sixth of the work only had been done.

It cannot be questioned that Mr. Hoxie was empowered to assent to a deviation, for by the statute (acts of 1874, ch. 337, sec. 3) he had the control and charge of work of this character. Now, a deviation in certain particulars of an entire contract does not, *per se*, alter the relations or rights of the parties thereunder, and upon him who asserts this must rest the obligation to show the change of relations or rights. There was no actual assent of parties to a change of relations or rights, and any implied assent from a difference in value or character of work can only arise by the party who asserts such difference in value or character assuming the initiative of showing the extent and quality of such difference. An attempt to show a difference in this case would result, as is apparent from the opinion of the Court of Claims, in a large additional claim of the appellees. The deviations to the appellees having been more costly in enlarging the sewer beyond the stipulation of the contract than was saved to them by using brick in the skew-back course, it is submitted, therefore, that the appellees are entitled to the allowance of thirty-five thousand four hundred and thirty-six dollars and forty-nine cents ($35,436.49), in pursuance of the decision of the Court of Claims that "the work was done substantially in conformity to the sample work and the working plan." See p. 29.

2d. The sewer was to run through the centre of the old Washington canal, but by consent of both parties it was shifted to outside of the canal.

By the contract "all the connections for lateral sewers must be made when and as directed by the engineer." The

Court of Claims, in its opinion, justly says: "This certainly requires the claimants to leave proper openings in the Tiber-creek sewer and join the lateral sewers thereto, but not to construct three hundred and seventy-three feet of sewerage in order to bring the several parts within joining proximity." It is sufficient to add that this lateral sewerage was constructed by order of the engineer, which order was given 26th April, 1875, and done in pursuance of the authority of the acts of 1874 (ch. 337, sec. 8). See also Messenger *vs.* Buffalo, 21 N. Y., 196, 1860.

It is submitted, therefore, that the appellants are entitled to the allowance of five thousand five hundred and twenty-five dollars and nineteen cents.

4th. The façade was purely ornamental, not provided for by the contract, but constructed by order of the engineer and under the authority conferred upon him by the aforementioned act.

5th. These allowances were all for items not provided for in the contract and furnished by order of the engineer, who was fully authorized by the act named.

6th. The sewer was, as stated, to be constructed down through the center of the canal. This of itself would fill up a large part of the canal and leave spaces at the sides of the sewer to be filled from each bank of the canal. This filling of the sides was provided for in the contract of Gallaher & Smith

When the sewer was shifted to the outside of the canal the appellees filled in and rammed down the sides about the sewer, and thus satisfied the requirements of the contract.

The contract was not to fill up the canal, but to fill up the narrow space between the sides of the sewer and the banks of the canal, and when the sewer was shifted this stipulation of the contract, as the Court says, became applicable to the sides of the sewer as elsewhere located. (Opinions, sec. VI, p. 31.)

The disallowance by the court of appellant's claim that the appellees should fill up the canal must be sustained. The act of 1880, June 16, vests in the Court of Claims both legal and equitable jurisdiction.

It is respectfully submitted that the judgment should be affirmed.

TH. HUGHES,
WOODBURY BLAIR,
For Appellees.

124-305

124-305

Office Supreme Court U. S.
FILED.
JAN 23 1888
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 141.

THE DISTRICT OF COLUMBIA

vs.

GALLAHER, LOANE AND COMPANY.

APPELLEES' SUPPLEMENTARY BRIEF.

Referring to appellant's claim (Brief, p. 11) that Lieutenant Hoxie "took the estimate of the Board of Public Works, by which the specified price was fixed, should show how it was arrived at. * * * This is all the testimony on record showing or tending to show what the work was worth." In this communication, purporting to be written by Lt. Hoxie, he does not explain if the Board of Public Works made their estimate on the work as defined in the working plan, or in the specifications attached to the Gallaher-Loane contract, or on the work to be performed similar to the sewer with which they connected, as was exacted by the Board from the contractors and accepted without protest.

In this case there was no attempt by the appellee to show in *evidence* a difference in value. The declarations of Lieu-

tenant Hoxie were not his testimony, although a statement in the appellant's brief (page 11) appears to assume this. As a matter of fact, there is no testimony of Lieutenant Hoxie in the record, and his statements quoted were those made long before this suit was instituted and do not have the effect of evidence in this case.

The appellees' brief says that as appellant's contract had annexed to it a plan for the sewer to be constructed, not in the bed of the canal as was the original contract of Gallaher & Smith, but to be constructed parallel to the canal, and yet the specifications called for the filling of the canal between the sides of the sewer and the banks of the canal, that this adds strength to the appellant's contention that the canal was to be filled up. But this is disposed of by remembering that while the contract of Gallaher & Smith called for a plan for the sewer in the bed of the canal, and specifications appropriately adapted thereto were annexed to the contract, yet, when the appellees' contract was made, a different plan was adopted, viz., parallel to the canal, but exactly the same specifications as in the Gallaher-Smith contract were annexed, thereby causing the stipulation to fill up between the sides of the sewer and the banks of the canal, which was applicable Gallaher-Smith contract, but no longer applicable to the appellees' contract, as the sides of the sewer were no longer between the banks of the canal.

TH. HUGHES,
WOODBURY BLAIR,
For Appellees.